Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition	)	WC Docket No. 04-245
For Declaratory Ruling and Preemption	)	
of State Action	)	

COMMENTS OF SBC COMMUNICATIONS INC. IN SUPPORT OF BELLSOUTH'S PETITION

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I. INTRODUCTION AND SUMMARY

SBC supports BellSouth's request that the Commission issue a declaratory ruling that the Tennessee Regulatory Authority ("TRA") has no authority to require BellSouth to provide unbundled access to enterprise switching at state-established rates. The Commission determined in the *Triennial Review* proceeding that competitors are not impaired without unbundled access to ILEC enterprise switching facilities. Accordingly, it declined to require unbundling of enterprise switching. Under the Supremacy Clause, states can not countermand that determination. Well-established conflict preemption principles bar the states from substantively regulating any wholesale products that the Commission has decided to *deregulate* by removing them from the scope of § 251 and subjecting them to, at most, the Commission's permissive oversight under § 201 and § 202. More fundamentally, states have no authority to regulate the rates, terms, and conditions under which Bell Operating Companies ("BOCs") provide items required by § 271 of the Act. The authority to do so resides solely with the Commission. Accordingly, the Commission should issue an order declaring the TRA's decision *ultra vires* and of no force or effect.

The Commission, moreover, should do so immediately and unequivocally. More and more states are flouting the domain of the Commission by commandeering responsibility for matters over which the Commission has jurisdiction. Unless and until the Commission enforces its decisions, states will continue their land grab over

unbundling and other issues within the Commission's province under the Act.[1] Indeed, the assertion of authority by various states over the voluntarily negotiated private commercial agreement between SBC and Sage plainly demonstrates that state saber rattling is made possible, and even encouraged, by Commission inaction in enforcing its decisions and defending its authority.[2] Accordingly, SBC urges the Commission to act quickly and definitively on this and other matters arising as a result of state encroachment on Commission unbundling decisions.

II. THE STATES HAVE NO AUTHORITY TO REGULATE THE RATES, TERMS, OR CONDITIONS OF ITEMS REQUIRED BY THE § 271 COMPETITIVE CHECKLIST

The TRA's reliance upon § 271 as the basis for its authority to regulate BellSouth's rates for enterprise switching is simply wrong as a matter of law. Section 271 states that a Bell Operating Company ("BOC") may provide interLATA services originating from in-region states only after demonstrating to the Commission its compliance with a fourteen point "[c]ompetitive checklist."[3] The competitive checklist incorporates by reference the requirement that BOCs unbundle "network elements in accordance with . . . sections 251(c)(3) and 252(d)(1),"[4] and, in addition, imposes four specific unbundling requirements "regarding loop, transport, switching, and signaling,

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[1] *See, e.g.,* Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing the Southern New England Telephone Company to Unbundle its Hybrid Fiber Coaxial Facilities, *Emergency Request for Declaratory Ruling and Preemption*, WC Docket No. 04-30 (Feb. 10, 2004); Petition for Declaratory Ruling and Order Preempting the Pennsylvania Public Utility Commission's Order Directing Verizon Pennsylvania Inc. to provide Unbundled Access to its Enterprise Switches, *Comments of SBC Communications Inc.*, WC Docket No. __ (April 26, 2004).

[2] SBC's *Emergency Petition* with respect to the Sage agreement was filed nearly three months ago, but the Commission still has not issued a Public Notice or otherwise acted on the petition.

[3] 47 U.S.C. §§ 271(c)(2)(B)(i)-(B)(xiv).

[4] *Id.* § 271(c)(2)(B)(ii),

without mentioning section 251."[5] The Commission has thus far determined that BOCs must continue to unbundle these specific items even if the Commission has removed them from the list of elements that must be provided pursuant to sections 251 and 252.[6] It is the Commission, however, and *only* the Commission, that has authority under § 271 to review the rates, terms, or conditions under which the BOCs provide such items.

The states have no role in delineating the actual substantive requirements, including prices, of the items required by the competitive checklist. Under the terms of the Act, the Commission has the sole authority to determine whether a BOC is in compliance with the checklist.[7] In contrast, a state commission's participation in the Commission's review is limited to providing "*consultation* . . . in order to verify" the BOCs' initial compliance with the competitive checklist in order to obtain approval to provide interLATA services.[8] Section 271 specifically provides that, after the Commission approves a BOC's application to provide interLATA service, the Commission has the authority to enforce the BOC's continued compliance with the conditions for approval and to impose penalties, including revocation of that approval.[9] The states, in contrast, have no role with respect to the ongoing obligations of the BOCs once they have received approval to provide interLATA services. More generally, nowhere does the statute provide a role for the states in determining the substantive requirements of the competitive checklist.

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[5] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket No. 01-338, FCC 03-336 ¶ 654 (Aug. 21, 2003)("TRO")(citing §§ 271(c)(2)(B)(iv), (v), (vi), and (x)).

[6] *TRO* ¶¶ 653-55.

[7] *Id.* §§ 271(d)(1) & (d)(3).

[8] 47 U.S.C. § 271(d)(2)(B)(emphasis added). In contrast, the Commission must elicit and give "substantial weight" to the United States Attorney General's "evaluation of the [BOC's] application." 47 U.S.C. § 271(d)(2)(A).

[9] *Id.* § 271(d)(6).

Congress's decision to exclude the state commissions from any role in implementing the substantive requirements of the § 271 competitive checklist was no accident, for it tracks the historically exclusive federal authority over the BOCs' participation in the long distance market. While the introduction of *local* competition had been the subject of state regulatory activity prior to the 1996 Act, *federal* law has governed entry into long distance markets by local telephone providers since at least the 1970s when the Department of Justice sued AT&T under the Sherman Act.[10] Federal supervision continued through the 1980s and early 1990s under a consent decree enforced by a federal district court.[11] Section 271 simply preserves the long-standing and exclusive federal supervision of the BOCs' entry into the long-distance market.

Thus, any residual requirement to provide an item under § 271 is purely a requirement of *federal* law, imposed under the terms of a *federal* statute that is administered solely by a *federal* agency. And any state effort to regulate any of the rates, terms, or conditions of items required under § 271 would violate that role assigned by Congress to the Commission. Simply put, the TRA lacks legal authority to regulate BellSouth's rates for enterprise switching, or any other item required by the § 271 competitive checklist, and the Commission should issue a declaratory order so holding.

III. THE TRA'S DECISION IS CONTRARY TO THE COMMISSION'S DETERMINATION THAT IT WILL REVIEW THE PROVISION OF ENTERPRISE SWITCHING UNDER THE STANDARDS OF §§ 201 AND 202

In its *Triennial Review Order*, the Commission found that "the record evidence demonstrates that there are few barriers to deploying competitive switches to serve customers in the enterprise market at the DS1 capacity and above, and thus no

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[10] *United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981).

[11] *United States v. AT&T*, 552 F. Supp. 186 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

operational or economic impairment on a national basis."[12] Accordingly, the Commission's national unbundling rules for local circuit switching provide that incumbent LECs are "not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops[.]"[13] This rule was upheld by the D.C. Circuit, which observed that "the CLECs do not contradict the Commission's observation about the absence of evidence of impairment either nationwide or in specific markets."[14] The Commission's determination on the issue is thus clear: in no state are ILECs required under § 251 to provide unbundled access to enterprise switching.

The Commission also has made clear that it will review the prices for items which no longer must be unbundled under § 251, but which must be provided by BOCs under the competitive checklist in § 271, including enterprise switching. Specifically, the Commission determined in the *UNE Remand Order* that, where a § 271 checklist element "does not satisfy the unbundling standards in section 251(d)(2), ... it would be counterproductive to mandate that the incumbent offer[] the element at forward-looking prices. Rather, *the market price* should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market."[15/] The Commission

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[12] *TRO* ¶ 451; *see also id.* ¶ 419 ("Based on evidence of competing carriers' widespread switch deployment to provide DS1 and above capacity service, we find on a national level that requesting carriers are not impaired without access to unbundled local circuit switching when serving DS1 enterprise customers.")

[13] 47 C.F.R. § 51.319(d)(3). The Commission's rule does provide for state commissions to petition for a waiver of this conclusion in accordance with certain conditions set forth in the rule. *Id.* Only the Puerto Rico commission filed a petition for waiver. The rule is thus now absolute in all 50 states and D.C.: no ILEC is required under § 251 to provide unbundled enterprise switching.

[14] *United States Telecom. Assoc.*, 359 F.3d 554, 587 (D.C. Cir. 2004)("USTA II").

[15] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Notice of Proposed Rulemaking*, CC Docket No. 96-98, FCC 99-238 ¶¶ 470, 473 (Nov. 5, 1999)("UNE Remand Order")(emphasis added).

further concluded in the *Triennial Review Order* that—both as a matter of statutory interpretation and sound telecommunications policy—"the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis—the standards set forth in sections 201 and 202."[16] Conversely, the Commission rejected the position that "network elements . . . unbundled by BOCs solely because of the requirements set forth in section 271" should be priced at TELRIC; indeed, to do so would "gratuitously reimpose the very same requirements that another provision (section 251) has eliminated."[17]

The TRA's decision directly conflicts with the Commission's determinations. State efforts to impose *regulated* rates for § 271-only elements, when the Commission has determined that *market* rates would better serve the public interest, conflict with the federal regime specifically established by the Commission. The TRA did not petition the Commission for a waiver of its decision not to require unbundling of enterprise switching in Tennessee. Rather, acting only on authority it improperly claimed under § 271, the TRA ordered BellSouth to provide unbundled enterprise local switching at rates established by the TRA. The TRA's decision is thus diametrically contrary to the Commission's determination that only *it* may review, under the *federal* standards of §§ 201 and 202, the rates for items provided by BOCs under the competitive checklist of § 271.

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[16] *TRO* ¶ 656.

[17] *TRO* ¶¶ 656, 659.

IV. BECAUSE THE TRA'S DECISION IS CONTRARY TO THE COMMISSION'S DETERMINATION, PREEMPTION IS APPROPRIATE.

Because it is contrary to the federal regime established by the Commission, the Commission should preempt the TRA's decision. It is a bedrock principle that when acting pursuant to its state law authority, a state agency must act within the constraints of federal statutory and regulatory limits. With respect to unbundling issues in particular, although § 251(d)(3) of the Act permits state commissions to adopt and enforce "any regulation, order, or policy" establishing "access and interconnection obligations," it specifically requires that any such order must be "consistent with the requirements of [section 251]" and must "not substantially prevent implementation of the requirements of [section 251] and the purposes of [Part II of the 1996 Act]."[18] It is, moreover, the Commission that Congress specifically tasked with implementing the requirements of section 251 and to "determine what network elements shall be unbundled,"[19] and the D.C. Circuit has confirmed that the Commission bears sole responsibility for that determination.[20] Moreover, as discussed above, states have no statutory authority to regulate the rates, terms, or conditions of items required by the competitive checklist in § 271. Therefore, any state regulatory requirements that undermine the Commission's implementing regulations necessarily "substantially prevent implementation of"[21] the requirements of the Act.

It is well-established "that state regulation *will be displaced* to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and

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[18] 47 U.S.C. § 251(d)(3).

[19] 47 U.S.C. § 251(d)(1).

[20] *See USTA II,* 359 F.3d at 565-568.

[21] State commissions must resolve interconnection disputes in accordance with "the requirements of section 251, *including* the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. § 252(c)(1)(emphasis added). This language makes clear that Commission regulations are "requirements of section 251" to which the states must adhere.

objectives of Congress."[22] Under the Supremacy Clause, "[t]he statutorily authorized regulations of [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."[23] Moreover, a Commission decision to refrain from regulation has as much preemptive force as a decision to regulate. As the Supreme Court has explained, when a federal agency "consciously has chosen not to mandate" particular action, that choice preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]."[24] And it is precisely for these reasons that the *Triennial Review Order* invites carriers facing unlawful state unbundling determinations to seek a declaratory order that the relevant state commission decision is contrary to federal law and therefore invalid.[25]

Preemption is necessary in such circumstances in order to protect the balance struck by the Commission in its unbundling rules. Unbundling determinations, including determinations that items not required to be unbundled under § 251 but nonetheless required by the competitive checklist will be priced at market rates, reflect important

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[22] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992) ("In determining whether state law 'stands as an obstacle' to the full implementation of a federal law, it is not enough to say that the ultimate goal of both federal and state law is the same. A state law is also pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal."); *Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) ("when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme").

[23] *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

[24] *Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982); *see also Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (agency decision not to regulate has preemptive effect when it "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute").

[25] *See TRO* ¶ 195 ("Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from the Commission.")

policy judgments and the balancing of competing interests.[26] Accordingly, once the Commissions strikes the balance in favor of not requiring unbundling and in favor of market prices for items required by the competitive checklist, a state may not depart from that federal judgment and override the Commission's determination. Indeed, the Commission itself made this argument in defending its *Triennial Review Order* before the D.C. Circuit, asserting that, "[i]n the UNE context, . . . a decision by the FCC not to require an [incumbent carrier] to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. Any state rule that struck a different balance *would conflict* with federal law, thereby warranting preemption."[27]

In addition, state imposition of pricing authority over items the Commission has declined to unbundle under § 251 would conflict not just with the Commission's deregulatory objectives, but also with the Act's "intent to establish a workable, uniform system."[28] As the Court explained in *Iowa Utilities Board*, the "presumption" governing close questions about the federal-state relationship under the 1996 Act "arises from the fact that a federal program administered by 50 independent state agencies is surpassing strange."[29] If 50 state commissions arrogated to themselves the power to impose unbundling requirements or to set prices for items no longer required to be unbundled

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[26] *See United States Telecom. Ass'n. v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002)(recognizing that "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."); *cf. Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 124 S.Ct. 872, 879 (2004)("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.")

[27] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 et al. (D.C. Cir. filed Jan. 16, 2004) (citations omitted)(emphasis added).

[28] *United States v. Locke*, 529 U.S. 89, 115 (2000).

[29] *Iowa Utils. Bd. v. FCC.*, 525 U.S. 366, 378 n.6 (1999).

under § 251 , ILECs inevitably would be subject to a patchwork quilt of regulatory regimes, and that outcome would conflict with the federal interest in a "workable, uniform system."

Commission preemption as requested by BellSouth is fully consistent with *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000). In *Geier*, the Department of Transportation ("DOT") decided to phase-in an airbag requirement over a period of years, because it determined that other policy goals—such as lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance—would be harmed by imposition of an immediate requirement.[30] The Supreme Court held that a state law, which effectively "required [automobile] manufacturers . . . to install airbags" immediately on all cars, directly conflicted with the DOT's policy determination. Because that law thus "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed,"[31] the Court held that it had to give way to the supremacy of federal law.

The Court's rationale in *Geier* applies with equal force in this situation. The Commission's unbundling decisions constitute specific "policy judgments" about how the 1996 Act's "congressionally mandated objectives," including the promotion of facilities-based competition, would "best be promoted."[32] Congress assigned that policy judgment to the Commission, and state commissions are bound by the Commission's determinations. Indeed, consistent with these principles, the Commission concluded in its *Triennial Review Order* that any state unbundling action beyond that required by the

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[30] *See Id.* at 875.

[31] *Id.* at 881.

[32] *TRO* ¶¶ 872, 881.

Commission must be "consistent with the requirements of section 251 *and* [cannot] 'substantially prevent' the implementation of the federal regulatory regime."[33]

Because the TRA's order conflicts with the Commission's decision to require the provision of enterprise switching at market based rates, it directly and substantially prevents the implementation of the federal regime and is precisely the sort of state decision which the Commission envisioned would not survive preemption analysis. The Commission has issued declaratory rulings in the past, in order to protect federal policies. For example, the Commission preempted a state regulatory decision that contravened the Commission's deregulatory policy for information services.[34] Moreover, the Commission has recognized its "broad and discretionary powers" to issue declaratory relief where state action threatened federal jurisdiction.[35] The TRA's decision violates the Commission's implementing regime, and it is clearly appropriate for the Commission to exercise its preemption authority under the facts presented in BellSouth's petition.

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[33] *Id.* ¶ 193.

[34] *See* Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992).

[35] *See* Memorandum Opinion and Order, *Telerent Leasing Corp. et. al. Petition for a Declaratory Ruling on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C. 2d 204, 213 ¶ 21 (1974). *See also* Declaratory Ruling, *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act, as Amended*, 6 FCC Rcd. 7511 (1991)(discussing and exercising Commission's authority to preempt state regulation); Declaratory Ruling, *Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission,* 93 F.C.C. 2d 1287, 1291 n.5 (1983)(discussing "the authority of the Commission to render declaratory rulings in the first instance regarding preemption; in making these rulings we are in a unique position to draw upon our expertise as a regulatory agency to determine whether national communications policies are adversely affected by conflicting State policies").

V. CONCLUSION

The Commission should grant BellSouth's petition. The Commission should issue a declaratory ruling that states have no authority, under any provision of the Act, to regulate the prices of items required by the competitive checklist of § 271. Moreover, under the Supremacy Clause, the Commission should preempt any efforts by states to encroach upon the federal regime established by the Commission for review of the rates, terms, and conditions under which BOCs provide any of the items required by the competitive checklist.

Respectfully Submitted,

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